No. 80-526

OCT 30 1980
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN MURRAY,

Petitioner,

v.

BRANCH MOTOR EXPRESS COMPANY, AND LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN OPPOSITION

CARL S. YALLER,
EDELMAN & RUBENSTEIN, P.A.
Suite 2400, 10 Light Street
Baltimore, Maryland 21202
301-752-6160
Attorneys for Respondent,
Local 557, International
Brotherhood of Teamsters

The Daily Record Co., Baltimore, MD 21202

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly concluded that Petitioner was required to exhaust internal union remedies which could have provided all the relief he now seeks.

TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF CITATIONS	ii
OPINIONS BELOW	1
JURISDICTION	1
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	7

TABLE OF CITATIONS

Cases

Brady v. Trans World Airlines, 401 F.2d 87 (3rd Cir. 1968), cert. den. 415 U.S. 915 (1974)	3
Chambers v. Local Union 639, 578 F.2d 375 (D.C. Cir. 1978)	6, 7
Clayton v. ITT Gilfillan, 104 LRRM 2118 (9th Cir. 1980)	5, 6
Fabian v. Teamsters, Local 557, 448 F. Supp. 835 (D. Md. 1978)	3
Fizer v. Safeway Stores, Inc., 586 F.2d 182 (10th Cir. 1978)	3
Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977)	5
Imel v. Zohn, 481 F.2d 181 (10th Cir. 1973), cert. den. 415 U.S. 915 (1974)	3
Kennedy v. General Truck Drivers, Local Union, 435 F. Supp. 277 (C.D. Cal. 1977)	4
McKeon v. Highway Truck Drivers & Helpers, Local 107, 223 F. Supp. 341 (D. Del. 1963)	4

PAGE

Miller v. Gateway Transportation Co., 616 F.2d 272 (7th Cir. 1980) 5

Packer v. International Brotherhood of Teamsters, 428 F. Supp. 145 (W.D. Pa. 1977) 4

Rizzuto v. Western Conference of Teamsters Pension Fund, 573 F.2d 553 (9th Cir. 1977) 4

Savel v. The Detroit News, 435 F. Supp. 329 (E.D. Mich. 1977) 3

Truck Drivers Union v. Riss & Co., 372 U.S. 517 (1963) 5

Wigelsworth v. Teamsters Local 592, 552 F.2d 1027 (4th Cir. 1976), cert. den. 431 U.S. 955 (1977) 4

Winter v. Teamsters, Local 639, 569 F.2d 146 (D.C. Cir. 1977) 3, 7

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 411 3

No. 80-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN MURRAY,

Petitioner,

v.

BRANCH MOTOR EXPRESS COMPANY, AND LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents,

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 40-50) is unreported. That of the Court of Appeals (Pet. 35-38) is unpublished, but reported in 622 F.2d 585.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1980. On July 29, 1980 Petitioner applied for an extension of time until September 30, 1980 in which to

apply for a Writ of Certiorari, which was granted by order of the Chief Justice on August 4, 1980. The Petition was filed on September 30, 1980, and invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

Petitioner John Murray was discharged by Branch Motor Express Company (Branch) in January, 1976 after refusing an order by his supervisor. The discharge was based upon this event and his past record including a warning letter of September 16, 1975 concerning insubordination. This warning letter was a vestige of Branch's discharge of Petitioner for that episode, after intervention of Local 557, International Brotherhood of Teamsters (Local 557).

Local 557 processed the 1976 discharge through the contractually-established grievance procedure and to an arbitration hearing. The hearing, held April 22, 1976 resulted in the upholding of the discharge (Pet. 41-42).

Although Article XIX, § 12 of the 1976 Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America requires a member, such as Petitioner, to exhaust internal union remedies prior to bringing suit against the union, Petitioner made no such effort (Pet. 43-44), but initiated the instant case. Based upon this failure the District Court granted summary judgment to both Local 557 and to Branch. The Court of Appeals affirmed the judgment of the District Court on the same grounds.

SUMMARY OF ARGUMENT

Certiorari should be denied. There is universal agreement between all Circuit Courts of Appeal that, absent a clear and convincing showing of inadequacy or futility, an employee must exhaust his internal union remedies prior

to initiating a suit claiming a breach of the duty of fair representation against his labor organization. Sound policy supports this rule of law enunciated by the various Circuit Courts, as well as the courts below in the instant case.

ARGUMENT

The concept of exhaustion of internal union remedies as a pre-condition to suit enjoys wide judicial recognition. The policy underlying the doctrine was most forcefully stated in *Imel v. Zohn,* 481 F.2d 181 (10th Cir. 1973), *cert. den.* 415 U.S. 915 (1974). The Tenth Circuit noted that the by-passing of carefully enunciated review measures of the Constitution of the international union therein involved, could only lead to industrial disharmony. Employees would go directly to court with alleged contractual breaches without giving their exclusive bargaining representatives the opportunity to fully consider the merits of the claim. Internal exhaustion may be circumvented only upon a "clear and positive showing of futility." See also *Brady v. Trans World Airlines,* 401 F.2d 87, 104 (3rd Cir. 1968), *cert. den.* 393 U.S. 1048 (1969). The Landrum-Griffin Act (29 U.S.C. § 411) allows unions to impose such exhaustion requirements and "the circuit courts have unanimously upheld the exhaustion requirement and commended its utility." *Winter v. Teamsters, Local 639,* 569 F.2d 146, 148 (D.C. Cir. 1977).

Article XIX, § 12 of the Teamsters Constitution provides reasonable remedies which a member must exhaust prior to launching a legal action against a local. Courts have recognized the efficacy of these mandatory remedies in both fair representation cases, *Fizer v. Safeway Stores, Inc.,* 586 F.2d 182 (10th Cir. 1978); *Winter v. Local Union No. 639, supra; Fabian v. Teamsters Local 557,* 448 F. Supp. 835 (D. Md. 1978); *Savel v. The Detroit News,* 435 F. Supp. 329 (E.D. Mich. 1977), as well as in other matters,

Rizzuto v. Western Conference of Teamsters Pension Fund, 573 F.2d 553 (9th Cir. 1977); *Wiglesworth v. Teamsters Local 592,* 552 F.2d 1027 (4th Cir. 1976), *cert. den'd.,* 431 U.S. 955 (1977); *Kennedy v. General Truck Drivers, Local Union,* 435 F. Supp. 277 (C.D. Cal. 1977); *Packer v. International Brotherhood of Teamsters,* 428 F. Supp. 145 (W.D. Pa. 1977); *McKeon v. Highway Truck Drivers & Helpers, Local 107,* 223 F. Supp. 341 (D. Del. 1963).

Application of the exhaustion doctrine is particularly appropriate in the instant case. The underpinning of Petitioner's fair representation claim lies in the allegation that the settlement of his September, 1975 discharge was not supposed to include adverse warning notices which could work against him in the event of future discipline (Pet. 11-12). Petitioner alleged that the Business Agent responsible for handling the 1975 incident had misinformed him concerning the detrimental impact of the warning notices (Pet. 11).

Both Respondents successfully contended below that the remedies available to Murray under the Teamsters' Constitution offered the solution to his alleged victimization. At any time during the months of employment after his reinstatement from the 1975 discharge, or even after the January, 1976 discharge and before the April, 1976 arbitration hearing, Murray could have leveled internal union charges against the Business Agent accusing the latter of either misleading Murray about the terms of the settlement, or of permitting Branch to unilaterally alter the terms of the reinstatement agreement. If Murray were able to sustain these allegations, the Business Agent could have been directed to file a grievance against Branch seeking to finally resolve the true nature of the 1975 settlement. Successful resolution of that grievance, either informally or pursuant to a decision by the contractually-established joint area committee, could have compelled Branch to remove from Petitioner's work record the

challenged warning notices. Since the contract requires a prior warning notice within the previous nine months before discharge (Pet. 42), Branch would not have been on firm contractual grounds to discharge Murray. Employer counsel's alleged concession on this point complained about by Petitioner (Pet. 16) and the Fourth Circuit's recognition of this problem (Pet. 37-38), merely is an acknowledgment of the binding powers of an award of a joint area committee. *Truck Drivers Union v. Riss & Co.*, 372 U.S. 517 (1963).

The Circuit Court opinions cited by Petitioner are not contrary to the decision of the Fourth Circuit. *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977) and *Miller v. Gateway Transportation Co.*, 616 F.2d 272 (7th Cir. 1980) on their face may appear to be similar to the instant matter, but in reality are distinguishable. In both cases the suits were instituted by employees dissatisfied with their union's handling of their discharge cases. Neither plaintiff alleged that union wrongdoing had transpired prior to the ultimate disposition of the grievance. Both courts concluded that the internal union procedures would be inadequate. In *Harrison* the union had agreed upon an unambiguous written decision which was final and binding on all parties, thus stripping the union of the appellate power to reverse the determination of its representatives. 558 F.2d at 1279. In *Miller,* the absence of the union on appeal to the Circuit deprived the plaintiff of a full economic remedy even if exhaustion were successfully undertaken. 616 F.2d at 275, n.6. In the instant case, the allegedly ambiguous settlement agreement could have been resolved favorably to Murray before the April, 1976 arbitration, thereby affording him the entire relief required to avoid his ultimate discharge.

The Ninth Circuit upheld summary judgment to the union, while reversing as to the employer in *Clayton v.*

ITT Gilfillan, 104 LRRM 2118 (9th Cir. 1980). The union defendant refused to arbitrate the discharge grievance of the plaintiff, who sued without pursuing internal remedies. The *Clayton* court noted that the limitation of the union's remedies to monetary loss was of no consequence, since the judicial remedy against the union would be similarly limited. 104 LRRM at 2119. Since plaintiff failed to give the union the opportunity to reverse itself, summary judgment as to it was appropriate. 104 LRRM 2119-20. The Court concluded that exhaustion was generally an available defense to employers, if such employee action could have produced the same result desired in court litigation. Unlike the instant matter, exhaustion would have been useless in producing the end sought by the *Clayton* plaintiff. 104 LRRM at 2121. Even a tortured interpretation of the *Clayton* decision is supportive of the grant of summary judgment to Local 557.

Chambers v. Local Union No. 639, 578 F.2d 375 (D.C. Cir. 1978), fits neatly into an exception to the exhaustion rule recognized by the same panel of the District of Columbia Circuit Court only months earlier in *Winter v. Teamsters, Local 639, supra*. The *Winter* Court noted that union hostility toward the member could excuse exhaustion. However, such an exception is limited to extreme facts in which those officers who were to sit in review of the employee's claim were either personally charged with the misfeasance in question or had consistently rejected the member's allegations over a period of time. 569 F.2d at 149. In *Chambers* the Teamsters local involved had adopted its own hardened interpretation of contractual seniority provisions challenged by certain employees. This hostile position was highlighted by that union's successful rearbitration of a dispute which had originally been decided favorably to the Chambers plaintiffs. When suit was directly initiated, exhaustion was forgiven since "union bias and conflict of interest make[s] any hope

illusory, [and] it would be an abdication of judicial responsibility to remit the plaintiff to the union's procedures." 578 F.2d at 388. *Chambers* does recognize the efficacy of the exhaustion defense. 578 F.2d at 384-86. Reliance upon the case by Petitioner is particularly misplaced since at no time in this proceeding, prior to the instant Petition (Pet. 25-26) has union hostility been either alleged or argued.

The policy grounds favoring the exhaustion requirement are brought into focus by the facts of the instant case. Petitioner should look to his own inaction as the cause of his alleged wrongful treatment. Affirmative steps by him could have led to elimination of the controversial 1975 warning letters, thereby aborting this controversy while it was still in an embryonic state. None of the cases cited by Petitioner deny the propriety of exhaustion defense to a union in these circumstances.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

CARL S. YALLER,
EDELMAN & RUBENSTEIN, P.A.
Suite 2400, 10 Light Street
Baltimore, Maryland 21202
301-752-6160
Attorneys for Respondent,
Local 557, International
Brotherhood of Teamsters